

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ROBERT A. GREENE, et al., ) Case No. 2:09-cv-00748-JCM-NJK  
Plaintiff(s), ) ORDER DENYING IN PART  
vs. ) MOTION FOR SANCTIONS  
ALAN WAXLER GROUP CHARTER ) (Docket No. 185)  
SERVICES, LLC, et al., )  
Defendant(s). )

Pending before the Court is Plaintiffs' motion for sanctions. Docket No. 185. Defendants filed a response and Plaintiffs filed a reply. Docket Nos. 190, 194. The Court finds the motion properly decided without oral argument. *See* Local Rule 78-2. For the reasons discussed more fully below, the Court hereby **DENIES** the motion in part.

As an initial matter, the Court notes that the motion seeks sanctions both for alleged discovery violations under Rule 37<sup>1</sup> and for alleged vexatious conduct under 28 U.S.C. § 1927 and Rule 11. *See* Docket No. 185 at 19-20. This order addresses only the request for sanctions under Rule 37, and a separate order will be issued addressing the request for sanctions under 28 U.S.C. § 1927 and Rule 11.

## **J. BACKGROUND**

This is a wage and hour lawsuit brought on behalf of limousine drivers, filed in 2009. Although an exact date is not clear from the record, initial disclosures appear to have been due in early 2010. *See*

<sup>1</sup> Unless otherwise noted, references to “Rules” refer to the Federal Rules of Civil Procedure.

1 Docket No. 171 at 1 & n.2. The Court subsequently extended the discovery cutoff on two occasions,  
 2 but discovery closed on June 30, 2011. *See* Docket No. 69. On October 25, 2013, Defendants filed a  
 3 motion for discovery sanctions seeking, *inter alia*, case-dispositive sanctions against Plaintiffs for failing  
 4 to provide initial disclosures. *See* Docket No. 149. The undersigned granted the sanctions motion in  
 5 part, but denied the requested case-dispositive sanctions. *See* Docket No. 171. Judge Mahan has  
 6 recently denied Defendants' motion to reconsider that order. *See* Docket No. 196.<sup>2</sup>

7 In the interim, Plaintiffs brought their own motion for discovery-related sanctions. Plaintiffs  
 8 assert that discovery sanctions should be imposed against Defendants because (1) Defendants failed to  
 9 supplement their responses to discovery requests; and (2) Defendants failed to provide initial  
 10 disclosures. Plaintiffs' motion for discovery sanctions is the motion currently before the Court.

## 11 II. ANALYSIS

12 Plaintiffs make two overarching arguments in support of their motion for discovery sanctions.  
 13 First, they argue that Defendants failed to supplement their responses to Plaintiffs' propounded  
 14 discovery requests. Second, they argue that Defendants failed to provide initial disclosures. The Court  
 15 addresses each argument in turn below.

### 16 A. Failure to Supplement Discovery Responses

17 On or about February 22, 2011, Defendants responded to various discovery requests propounded  
 18 by Plaintiffs. *See* Docket Nos. 185-4, 185-5. Plaintiffs argue that Defendants should be sanctioned for  
 19 failing to supplement these discovery responses. In particular, Plaintiffs argue that Defendants violated  
 20 their obligation to supplement because they failed to provide class-wide information following the order  
 21 certifying the class in this case. *See* Docket No. 185 at 9-14. Defendants counter by asserting that class-  
 22 wide information was not sought in the initial discovery propounded, so they had no duty to supplement.  
 23 Docket No. 190 at 6.<sup>3</sup>

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25 <sup>2</sup> The case is now set for trial on July 28, 2014. *See* Docket No. 184.

26 <sup>3</sup> Although not entirely clear, Plaintiffs may also be arguing that the discovery responses pertaining  
 27 to the named Plaintiffs also had to be supplemented for the years preceding 2007. *See* Docket No. 185 at  
 28 8-9. Defendants' response asserts without explanation that no such supplementation was required for the  
 named Plaintiffs in light of Defendants' "valid objections." *See* Docket No. 190 at 8. The arguments

1       As an initial matter, although Plaintiffs refer to serving requests for admission, requests for  
 2 production, and interrogatories, they do not identify with specificity which discovery requests they  
 3 contend required supplementation following class certification. *See* Docket No. 185 at 8. Nonetheless,  
 4 the focus of Plaintiffs' arguments relate to class-wide wage-and-hour records, *see, e.g.*, Docket No. 185  
 5 at 3, so the Court will focus its analysis on the requests for production seeking such information.

6       Problematically for Plaintiffs, however, the relevant requests for production were limited to the  
 7 named Plaintiffs and did not seek documents related to the claims of absent class members. *See, e.g.*,  
 8 Request for Production 1 (Docket No. 185-3) (seeking time sheets for "each of the plaintiffs named in  
 9 the consolidated action of *Sam Baum, et al. v. Alan Waxler, et al.* (Consolidated Case No.: 2:09-cv-  
 10 00914) ('Baum Plaintiffs')). An obvious predicate to an obligation to supplement is that the  
 11 information at issue was actually sought in the first place; the supplementation requirements in Rule  
 12 26(e) do not require "that a party volunteer information not fairly encompassed by the earlier request."  
 13 *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 540 (3d Cir. 2007) (quoting *In re Air Crash*  
 14 *Disaster*, 86 F.3d 498, 539 (6th Cir. 1996)). Defendants did not violate any obligation to supplement  
 15 their discovery responses with class-wide information because such information was not sought in the  
 16 discovery that was propounded.<sup>4</sup> Accordingly, to the extent Plaintiffs seek sanctions for Defendants'  
 17 purported failure to supplement their discovery responses with class-wide information, the motion is  
 18 **DENIED.**

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 22 regarding supplementation for discovery pertinent to the named Plaintiffs are not sufficiently developed for  
 23 the Court to issue a ruling. *See, e.g.*, *The Vaccine Ctr. LLC v. GlaxoSmithKline LLC*, 2013 U.S. Dist. Lexis  
 24 68298, \*8 n.4 (D. Nev. May 14, 2013) (quoting *Williams v. Eastside Lumberyard & Supply Co.*, 190 F.  
 Supp. 2d 1104, 1114 (S.D. Ill. 2001)).

25       <sup>4</sup> Plaintiffs note that, after the discovery cut-off had passed, their counsel corresponded with  
 26 Defendants' prior counsel about the possibility of Defendants providing class-wide discovery despite the  
 27 lack of a formal discovery request. *See, e.g.*, Docket No. 185 at 10-11. Defendants ultimately changed  
 28 course when Plaintiffs refused to agree to reopen discovery generally. Plaintiffs provide no legal authority  
 in support of the argument that documents must be produced in response to such communications, and the  
 Court finds any such argument unpersuasive.

1           B.     Failure to Provide Initial Disclosures

2       Plaintiffs also argue that Defendants failed to provide initial disclosures. When a party fails to  
 3 meet its initial disclosure obligations, the Court turns to Rule 37(c) to determine whether sanctions are  
 4 appropriate. Rule 37(c)(1) provides that a non-compliant party is “not allowed to use the information  
 5 . . . at trial, unless the failure was substantially justified or harmless.” The party facing the sanction has  
 6 the burden of showing substantial justification or harmlessness. *See Yeti by Molly, Ltd. v. Deckers  
 7 Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001).

8           1.     Class-Wide Wage and Hour Records

9       Plaintiffs argue that Defendants failed to comply with their initial disclosure obligations because  
 10 they did not provide class-wide information to support Plaintiffs’ claims. *See, e.g.*, Docket No. 185 at  
 11 3 (asserting that Defendants “fail[ed] to make initial disclosures . . . by withholding key wage and hours  
 12 records showing AWG’s liability and Drivers’ damages”). Defendants contend that this argument fails  
 13 because Rule 26(a) does not require an initial disclosure of information necessary for the opposing party  
 14 to support its claims. *See* Docket No. 190 at 4. The Court agrees with Defendants. The Rule very  
 15 clearly requires each party to disclose information that the disclosing party “may use to support *its*  
 16 claims or defenses.” *See* Rule 26(a)(1)(A)(i)-(ii) (emphasis added). “This means that there is no  
 17 requirement to disclose anything that the disclosing party will not use, which may include much that is  
 18 harmful to its case. . . . [A] party is not required to disclose material that will solely aid its opponent.”  
 19 8A Wright, Miller, & Marcus, FEDERAL PRACTICE AND PROCEDURE, § 2053, at 365-66 (2010)  
 20 (discussing 2000 amendments); *see also Harris v. Advance Am. Cash Advance Ctrs., Inc.*, 288 F.R.D.  
 21 170, 171 (S.D. Ohio 2012) (citing *El Camino Resources, Ltd. v. Huntington Nat'l Bank*, 2009 WL  
 22 1228680, \*3 (W.D. Mich. Apr. 30, 2009)); *In re Fort Totten Metrorail Cases*, 279 F.R.D. 18, 22-23  
 23 (D.D.C. 2011). While Plaintiffs bemoan the challenge they face going to trial without discovery  
 24 regarding class-wide damages, *see* Docket No. 185 at 6, they have not shown that Defendants were  
 25 obliged to provide that information as an initial disclosure. Accordingly, to the extent Plaintiffs seek  
 26 sanctions for Defendants’ purported failure to provide initial disclosures with class-wide information  
 27 to support Plaintiffs’ claims, the motion is **DENIED**.

1                   2. Witnesses and Documents Supporting Defendants' Defenses

2                   Defendants assert that the witnesses and documents that they intend to rely upon at trial to  
 3 support their defenses were previously provided to Plaintiffs, albeit not in the form of initial disclosures  
 4 or by the initial disclosure deadline. *See Docket No. 190 at 4* (referring to information provided in  
 5 response to Plaintiffs' discovery requests). Defendants provided their discovery responses on or about  
 6 February 22, 2011. *See Docket Nos. 185-4, 185-5*. The discovery cut-off did not expire until more than  
 7 four months later, on June 30, 2011. *See Docket No. 69*. Hence, this information was not provided by  
 8 the initial disclosure deadline, but it was provided well before the discovery cut-off.

9                   As noted above, sanctions for failing to provide initial disclosures are not appropriately imposed  
 10 where the shortcoming was substantially justified or harmless.<sup>5</sup> Courts are most likely to exclude  
 11 evidence first disclosed shortly before trial or substantially after discovery has closed. *See, e.g., Jackson*  
 12 *v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 594 (D. Nev. 2011). Defendants argue that  
 13 sanctions are inappropriate here because any violation was harmless, and the Court agrees. In particular,  
 14 Defendants argue that they intend to rely at trial only on the information they provided during the  
 15 discovery period. *See Docket No. 190 at 4*.<sup>6</sup> Plaintiffs had full opportunity (for four months) to serve  
 16 new discovery requests based on any of the information provided in February 2011, and have had ample

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18                   <sup>5</sup> Plaintiffs appear to argue in reply that the failure to timely provide initial disclosures automatically  
 19 results in sanctions. *See Docket No. 194 at 2-4* (arguing that Rule 26(a) does not have any "safe harbor"  
 20 provision and a party cannot "cure" its failure to timely provide initial disclosures). This argument is  
 21 somewhat puzzling. As Plaintiffs' opening brief acknowledges, sanctions are not appropriate where the  
 22 failure to provide initial disclosures is substantially justified or harmless. *See Docket No. 185 at 4-5*.

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24                   Plaintiffs also argue that no "supplemental" disclosure was ever made because the information was  
 25 obtained in response to discovery requests. *See Docket No. 194 at 3-4* ("Plaintiffs did not serve discovery  
 26 in order to enable AWG to meet its initial disclosure requirement"). But in these circumstances, a formal  
 27 supplemental disclosure was not required. *See Rule 26(e)(1)(A)* (requiring supplemental disclosures where  
 28 a party learns that its disclosure was incomplete only where the missing information "has not otherwise been  
 made known to the other parties during the discovery process").

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30                   <sup>6</sup> Plaintiffs argue that the information disclosed is insufficient for Defendants to meet their burden  
 31 on certain defenses, *see, e.g.*, Docket No. 194 at 4 (discussing the Motor Carrier Act exemption), but that  
 32 is an issue for the fact-finder at trial. What is relevant here is that Defendants disclosed the information they  
 33 will rely on in support of their defenses.

1 time to prepare for trial in light of the disclosed information. Given the facts of this case, the Court finds  
2 that imposing sanctions for the late-disclosure of this information is inappropriate because the failure  
3 was harmless. Accordingly, to the extent Plaintiffs seek sanctions for Defendants' late initial  
4 disclosures, the motion is **DENIED**.

5 **III. CONCLUSION**

6 For the reasons discussed more fully above, Plaintiffs' motion for sanctions is hereby **DENIED**  
7 in part.

8 **IT IS SO ORDERED.**

9 DATED: June 19, 2014

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11 NANCY J. KOPPE  
United States Magistrate Judge

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